Guidance on the Working Time Regulations

The purpose of this guidance is to outline the provisions of the Working Time Regulations (WTR) and explain the way in which they apply in OFT.


What rights do the Regulations provide?

The basic rights and protections that the Regulations provide are:

- A limit of an average of 48 hours per week over a prescribed 'reference period' of (usually) 17 weeks which a worker can be required to work (though workers can choose to work more if they want to). Regulation 4(1) states 'a worker's working time, including overtime, in any reference period, shall not exceed an average of 48 hours for each seven days'. A worker may work more than 48 hours in any given week, provided that the average weekly working time over the reference period does not exceed the prescribed 48 hours.

- A right to a daily rest period of 11 consecutive hours between shifts (working days).

- A right to an uninterrupted rest period of not less than 24 hours each week (although this can be aggregated to one uninterrupted rest period of 48 hours over a 14 day period).

- Where the working day is longer than six hours, a right to an uninterrupted rest break of 20 minutes during the six hour period (not at the beginning or end of it).

- A limit of an average of eight hours work in 24 which night workers can be required to work.

- A right for night workers to receive free health assessments before they start working nights and on a regular basis while the night work continues.
From 1 October 2007, workers have had a statutory entitlement to 24 days paid annual leave each year, pro-rated for those working part-time. This increases to a statutory right to 28 days paid annual leave each year with effect from 1 April 2009 (pro-rated for those working part-time). Bank holidays can be counted towards the statutory entitlement. (See annual Leave below for more detail).

Who do the Regulations apply to?

The Regulations define a 'worker' as:

- Someone who has a contract of employment (an employee), or
- Someone who is paid a regular salary or wage and who works for an organisation, business or individual. The employer normally provides the worker with work, controls when and how the work is done, supplies them with tools and other equipment, and pays tax and National Insurance contributions. This includes part time and temporary workers, and the majority of agency workers and freelancers.¹

This means that the Regulations apply to all staff in OFT, including members of the SCS, fixed term employees and agency staff.

Young workers

Following the Young Workers Directive as implemented by the Working Time (Amendment) Regulations 2002, certain provisions relate to 'young workers', that is, those over school leaving age but under the age of 18. While this has, in principle, an effect on the OFT, we have very few such staff in post. However, it is always possible that we may recruit such individuals, so staff managers in particular need to be aware of the provisions of this part of the Regulations. The key provisions are:

¹ There are some types of workers to whom the Regulations do not apply, because they are governed by sector specific provisions. These include the armed forces, the police and emergency services, and workers in sea transport, air transport and mobile workers in inland waterways and lake transport, but none of these exceptions are relevant to OFT.
• A limit on the hours of work to eight per day, and a maximum working week of 40 hours per week.

• An uninterrupted rest period of 30 minutes where their normal working day is more than four and a half hours.

• A rest period of not less than 48 hours in a seven day period. This cannot be aggregated over a 14 day period.

• There is no provision for averaging weekly working time over a reference period, and no opt out.

• Night work is permitted up to 10pm or 11pm, but the worker will not be able to work again before 6am or 7am, depending on the terms of the contract. This is known as the 'restricted period'.

• Night work is prohibited during the restricted period unless there is a need to maintain continuous service or production, or to respond to a surge in demand.²

How is 'Working Time' defined by the Regulations?

Under the Regulations 'working time' means any period during which the individual is working, is at the employer’s disposal and is carrying out their activities or duties.

This includes:

• any period during which the worker is receiving training that is directly related to their job

• travel time during the working day (for example, the journey between two clients or meetings)

• working lunches, such as business lunches

² There are very limited exclusions to Regulation 6 of the WTR (the length of night work) for young workers. These include employment in a hospital or similar organisation, or in cultural, sporting or advertising activities. A partial exemption is available for workers in agriculture, retail, postal work catering, hotels, pubs or bakeries. Where work is required in the restricted period, there is a requirement to grant an equivalent period compensatory rest.
• time spent waiting at the place of work for work to be allocated

• time spent working away from home

• time on call at the workplace.

Working time does not include:

• the journey between the workplace and the home (in either direction)

• time resting at the end of the working day, even if the worker is required to stay away from home overnight

• time spent 'on-call' when away from the workplace and not carrying out duties.

Working time is not limited to contractual hours (that is, paid or unpaid overtime is counted as working time).

**Working time: collective agreement between CCSU and the Cabinet Office**

The regulations do, however, allow for some flexibility in the way they are applied. In particular, some rights may be modified by local agreement. The Cabinet office has reached a collective agreement with the Council of Civil Service Unions of the definition of working time for the non-industrial Home Civil Service, which provides that the following circumstances should normally count as working time:

• meal breaks – where staff are at the disposal of and actively engaged on their employer's business, for example working lunches

• on-call time – where staff are actively engaged on their employer's business, that is, only when called upon to perform their duties

• travel time – normal business travel (excluding time spent travelling between home and the normal place of work), that is, travelling in the process of work duties, and additional time spent travelling to a different work station (for example travel between Fleetbank House and the OFT's office in Edinburgh)
• work performed away from the normal place of work – but only where the work is performed on a basis agreed with the employer and the time is properly recorded – for example homeworking

• other business engagements – only where staff are required to attend work related functions as part of their duties (for example speaking at conferences)

• agreed time spent undertaking trade union or health and safety representative duties.

The 'reference period'

The standard 'reference period' is 17 weeks. In the OFT it has been agreed that this will be any period of 17 weeks in the course of a worker’s employment (in effect a rolling reference period).

Calculation of average weekly working time

The calculation of average weekly working time must take account of periods where individuals are absent due to statutory annual leave, sick leave, maternity leave, paternity leave, adoption leave and/or parental leave. If any of this leave occurs within a 'reference period' the number of hours worked in the first working days after the reference period must be added to total hours worked to balance this absence.

Other authorised absence, such as special leave or additional contractual annual leave (that is, any leave in excess of the statutory entitlement), should not be included in the total number of hours worked during the reference period. In calculating average weekly working time, such leave will serve to reduce the average hours worked.

Managers should note that there are, therefore, two categories of annual leave which affect the calculation of working time in different ways:

• leave up to the statutory entitlement under the Regulations (24 days [28 days from 1 April 2009] – see annual Leave below) requires a balancing addition to hours worked during the reference period

• subsequent contractual annual leave will reduce the time worked during the reference period.
Rest periods

The Regulations say that a worker whose working day is longer than six hours is entitled to a rest break of at least 20 minutes during the period (not at the beginning or end of it). The break can be spent away from the worker’s workstation/desk. A young worker (under 18) is entitled to a 30 minute break after four and a half hours daily working time.

In the OFT, conditioned hours for full time staff allow for a one hour meal break every day. Meal breaks count as breaks for the purposes of the regulations. Part-timers, including those part-timers on flexitime, are not paid for meal breaks and thus may be reluctant to take them. Managers must therefore ensure that staff who work more than six hours in one day, particularly part-timers, do take a break. In the OFT, the minimum break which staff are required to take is 30 minutes, instead of the regulation 20 minutes (see hours and extra duty and the flexi-time guidance).

Where patterns of work involving uninterruptible or monotonous activities put the health and safety of staff at risk, managers should ensure that they are given adequate rest breaks.

A worker is also entitled to a rest period of 11 consecutive hours between each working day, and an uninterrupted rest period of 24 consecutive hours in each seven day period.

Annual leave

Under the Regulations, from 1 October 2007 workers are entitled to 24 days paid annual leave each year, pro-rated for those working part-time. This increases to a statutory right to 28 days paid annual leave each year with effect from 1 April 2009 (pro-rated for those working part-time).

This is not additional to contractual entitlements, but forms part of it. Taking contractual paid annual leave in a particular leave year therefore counts as part of the entitlement under the Regulations. Since the annual leave allowance in OFT is 30 days, plus bank and privilege holidays, no changes will be made to leave entitlements. In other words if, as in the OFT, your contractual paid annual leave entitlement is greater than the 24 (28) days stipulated by the Regulations, you have no further entitlement to such leave.
Public holidays and privilege days are not statutory rights. Therefore, as with other contractual leave, they can be used to discharge an employer’s responsibility for providing the statutory leave entitlement under the Regulations. However, contractually in OFT, public and privilege holidays are in addition to the paid annual leave entitlement – so in effect OFT staff receive 40½ days of paid leave each year.

The annual leave entitlement under the Regulations may only be taken in the leave year that it is due. That minimum period may not be replaced by a payment in lieu, except where employment has ended, when the worker is entitled to payment for any untaken statutory annual leave from their final year of employment on a pro-rata basis.

Staff managers may need to review their arrangements for anticipating or carrying over annual leave to ensure that large amounts of anticipated or carried over annual leave do not, in practice, infringe the Regulations. So long as no individual is denied their statutory entitlement, however, current arrangements for anticipation, carryover and banking of annual leave will continue until 1 April 2009. From that date the limits for banking and carryover will change, in order to comply with the requirement that individuals should take their statutory leave entitlement as a minimum. For more detail, see the annual Leave policy.

**Advertising of vacancies**

Employers are not permitted to make an agreement to work in excess of the 48 hour limit a condition of assignment to a particular post (or continuance in a post). Vacancies should not, therefore, be advertised in such a way that they would only attract applicants willing to work beyond the 48 hour limit. Where a post carries the possibility of long or unpredictable working hours, this may be discussed with candidates. To do otherwise could give an otherwise suitable applicant who was not selected grounds to appeal to an employment tribunal that they had been subject to detriment because they had refused to forgo their right to work no more than 48 hours per week. For further information, see the recruitment policy.

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3 As a reminder, currently up to ten days may be carried forward from one leave year to the next, and up to five days may be banked.
Workers with more than one job

Where a worker has more than one job, both employers are responsible for ensuring that the 48 hour week is complied with. Individuals should therefore ensure that they inform their staff manager and HR about any work they undertake for other employers, so that working hours can be adjusted accordingly, if possible. If this is not appropriate, the individual may be asked to sign an agreement to disapply the limit.

Where staff are engaged in project work which involves them working for more than one work manager, they should ensure in discussion with their staff and work managers that they are not working a total of more than 48 hours per week. If this cannot be avoided, in exceptional circumstances, the individual may want to sign the agreement to disapply the limit. This should not, however, be done as a matter of routine, and should not be encouraged.

Night work

Although OFT does not currently have any staff who regularly work at night, staff managers should be aware of the provisions of the WTR relating to night workers. 'Night time' is between 11am and 6pm. A 'night worker' is someone whose daily working time includes at least three hours of night time either:

• on most days they work

• on a proportion of the days they work, which is specified in a collective or workforce agreement

• often enough for it to be said that you work such hours 'as a normal course' (that is, on a regular basis).

Occasional or ad hoc work at night does not make someone a night worker.

Staff managers must take steps to ensure that the 'normal hours' of their night workers do not exceed an average of eight hours in 24 over a 17 week period. This does not necessarily rule out longer or extra shifts. It should be noted that this is a separate limit from the weekly working hours limit. Significant overtime hours during a reference period may breach the weekly working hours limit.
Staff managers must provide night workers, or a worker who has become a night worker, with the opportunity to have a free health assessment. The arrangements for such assessments should be made in consultation with the trade union side, the OFT’s health and safety officer and health advisers. At regular intervals thereafter, the individual must be given the opportunity for further free assessments. Where a registered medical practitioner has advised that a member of staff is suffering from health problems related to night work, staff should, if possible, be allowed to transfer to normal working. The appropriate continuity arrangements should be applied when an individual transfers to normal working.

**Opting out – responsibilities of the staff manager, work manager and HR**

The Regulations require an employer to take all reasonable steps to ensure that workers do not work more than an average of 48 hours per week over a 17 week period. Conditioned hours in OFT are 36 hours per week, plus five non-working hours for lunch. **A 48 hour week is a long week and working in excess of this over a 17 week period should not be necessary.**

Staff and work managers should identify those who are regularly working longer hours and consider adjusting their hours and/or redesigning their job so such hours are no longer necessary. Where this is not possible, and **only** where there are compelling management reasons for doing so, the individual should be invited to sign an agreement to disapply the 48 hour limit. It will, of course, be up to the individual to decide whether to sign the agreement or not. There will be no expectation or pressure from management that the individual should do so.

Before this can be implemented, the individual should notify HR, who will arrange an interview with them to discuss the reasons for their wishing to opt out. This will enable HR to monitor the situation and take action if there are particular areas where a number of staff are opting out. Once the interview has taken place, HR will issue the relevant documentation. The agreement must be in writing and must allow the worker to bring the agreement to an end.

Staff and work managers should also be aware of those staff who, although they do not breach the 48 hour limit, are close to doing so, and should take action to address this, bearing in mind the duty of care owed by the OFT to maintain a safe and healthy working environment, which includes reasonable working hours. Individuals who are in this position should also take responsibility for notifying their staff and work managers as soon as possible, so that action can be taken to reduce their hours.
HR will keep a central record of which members of staff have signed this type of agreement and the terms which have been agreed to. The individual and their staff manager should also retain a copy of the agreement.

Staff managers must ensure that where voluntary agreements to work more than 48 hours are made, they maintain a record of the weekly working time for the individual during each reference period, for the duration of the agreement, and forward this information to HR. A record of hours worked form is available for recording the hours worked by individuals who have signed such an agreement. It is the staff manager’s responsibility to ensure that records are kept continuously, to monitor those records and to discuss any concerns which arise with the individual member of staff. Records must be retained for a period of three years.

**Responsibilities of the individual**

It is the responsibility of the worker who has agreed in writing that the 48 hour limit on average weekly working time shall not apply in their case, to maintain the appropriate record of hours worked and to submit it regularly to their staff manager for sign off.

One copy of this record should be retained by the individual for their personal records, one copy, authorised by the staff manager, should be sent to HR, and the staff manager should retain the original. Details of any authorised leave or other absence should be noted on the record sheet and the nature of the absence recorded.

**Cancelling the opt out**

A worker can cancel their opt-out agreement at any time. The notice period for cancelling the agreement can be from a minimum of seven days up to three months and the withdrawal must be in writing. In OFT, the minimum notice period is seven days.

**Senior Civil Servants**

All members of the SCS are subject to the Regulations. When Permanent Secretaries discussed the WTR, they thought that the arrangements for seeking voluntary
agreements to disapply the 48 hour limit on average working time should be the same for the whole of the SCS. Similarly, they expressed a preference for a universal system to be adopted to monitor the hours worked by members of the SCS who had entered into such voluntary agreements.

The rules and procedures for SCS staff who sign a voluntary agreement to opt out are the same as for all other staff in the OFT. SCS staff should not regularly work more than 48 hours per week unless they have signed such an agreement.

Enforcement

The Health and Safety Executive and Local Authority Environmental Health Officers are responsible for enforcing the limits and obligations under the Regulations, and OFT must provide records to the HSE or LAEHO if they wish to inspect them. It is therefore important that the above details are recorded.

The Regulations have effect in relation to Crown employment and Crown employees. However, for Crown employment, Regulation 37 (which can be found at www.opsi.gov.uk/si/si1998/19981833.htm#37 ) provides that where there would have been an offence under Regulation 29 (which can be found at www.opsi.gov.uk/si/si1998/19981833.htm#29) as amended by www.opsi.gov.uk/si/si2003/20031684.htm there may be an application to the High Court (Court of Session in Scotland) for a declaration that there has been an unlawful act or omission.